100 pounds, and purchasing the smoke ball, using it for two weeks, and contracting influenza were not contemplated as furnishing a *quid pro quo* in exchange for the promise. Where the defendant entered into a written agreement to pay his daughter $2500 a year upon her marriage to her fiance, the promise was held enforceable over the contention that only a gift was intended. The fact that the promise was in writing was held to be an indication that the marriage was regarded as consideration for the promise, and the court said that it was induced to find a consideration in this case because the policy of the law favored marriage settlements. *De Cicco* v. *Schweizer,* 221 N. Y. 431. In *Schoenmann* v. *Whitt,* 136 Wis. 332, the plaintiff was given the exclusive right to sell real estate, with no consideration stated in the agreement. The defendant himself sold the property during the period stipulated, and it was held the plaintiff could not recover a commission only because he had failed to furnish consideration for the exclusive agreement by not endeavoring to sell the property. But in a recent case with very similar facts, in which the plaintiff did exploit the property for sale, a recovery was granted. Although the agreement expressed no consideration, and was said by the court to have been purely unilateral and to have imposed no obligations upon the plaintiff when made, still the plaintiff by performing services which were only impliedly contemplated converted that unilateral agreement into a binding contract. *Hughes* v. *Bickley,* 205 Ala. 619. It is thus seen that many courts, in the interest of the sanctity of promises, indicate a laudable effort to modify the rule that consideration must be something given strictly in exchange for the promise. C. E. B.

DELEGATION OF LEGISLATIVE POWER—ADOPTION BY STATE OF FEDERAL PROHIBITION LAWS.—A bill was proposed in the Massachusetts General Court by the operation of which all laws made and to be made by Congress concerning the enforcement of the Eighteenth Amendment would be incorporated automatically into the law of Massachusetts. An opinion on the bill was requested. *Held,* that it would be contrary to the constitution of the commonwealth, that the legislative power is vested exclusively in the General Court except so far as it is retained in the people by the initiative and referendum provisions, and that it could not be delegated or surrendered as proposed. *In re Opinion of Justices* (Mass., 1921), 133 N. E. 453.

One of the established maxims of the law is that those to whom a power to exercise an authority has been given may not delegate it to others unless the power to delegate it has also been conferred. This legal principle is based upon the implied intention of the one who confers the power that it shall be exercised only by the person or body of persons to whom it is primarily delegated. It should be noticed that when the doctrine is applied as a restriction upon legislative bodies it rests upon implication only, for nowhere is it expressly commanded by the organic law that delegated powers shall not be re-delegated. It is well to observe, moreover, that the power to re-delegate, though it may be given expressly, as in the case of the initiative and referendum amendments, may also be implied. This is

done, in fact, in the case of permitted delegations of the powers of local self-government to local municipal bodies.

Some courts have adopted a strict and almost inflexible attitude whenever the issue of the delegation of legislative power has been presented. Among the decisions which illustrate this view is *Dowling* v. *Lancashire Insurance Co.*, 92 Wis. 63. A statute authorized the state insurance commissioner to prepare a standard form of fire insurance policy, such form to conform as nearly as possible to that of New York. The court held this procedure to be an unconstitutional delegation of legislative power, saying in the course of the opinion: "The result of all the cases on this subject is that a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors, or other appointee or delegate of the legislature, so that, in form and substance, it is a law in all its details *in praesenti,* but which may be left to take effect *in futuro,* if necessary, upon the ascertainment of any prescribed fact or event."

But it is a demonstrable fact, and it will appear from the decisions hereafter to be cited, that the legislature has not always found it possible to stay within the limits thus prescribed and at the same time properly to provide the machinery of government. Modern economic conditions demand legislation of a quite different character from that of the day when the above principle was first applied to legislative power. Rate regulation cannot be satisfactorily accomplished by direct legislative enactment. Increased congestion in the centers of population has demanded vastly increased powers for municipal bodies. Interstate and international relations have demanded reciprocal legislation of a kind which looks suspiciously like delegation of power. And the fact of the matter is that, whenever the exigencies have demanded with sufficient persuasiveness a delegation of some small fraction of legislative power it has been delegated, and the procedure has been duly approved by the courts. It is true that the courts have been reluctant to call the act a delegation of *legislative* power. In fact, they have been unusually astute to discover some other name by which to call it. But the fact remains that power has been delegated, by whatever name it may have been called. Mr. J. D. Barnett, in the conclusion of an article in which he reviewed a number of cases of the delegation of congressional power to the state legislatures, phrased the matter as follows: "It appears from this discussion that although the accepted doctrine in regard to the unconstitutionality of the delegation of legislative power has never been expressly denied in this connection, but at times has been clearly stated and strictly applied, more often there have been attempts to avoid a conflict with the theory by indirect legislation *or forced construction, or the theory has been utterly ignored.*" 2 AMERICAN POLITICAL SCIENCE REVIEW, p. 347.

A study of the decisions allowing and disallowing fractional delegations of power will impress one with the truth of the above statement and also with the fact that the keynote in each case where the delegation has been permitted has been the practical necessity for it. Prominent among these

decisions are those upholding delegations of power to commissions to fix the rates of common carriers. In *State* v. *C., M. & St. P. Ry.*, 38 Minn. 281, the court held that a statute declaring that railroad rates should be equal and reasonable, and delegating the rate-fixing power to a commission, was not invalid because of unconstitutional delegation of legislative power. It said: "They (the legislators) have not delegated to the commission any discretion as to what the law shall be—which would not be allowable—but have merely conferred upon it an authority and discretion to be exercised in the execution of the law, and under and in pursuance of it. * * * It (the commission) is merely charged with the administration of the law, and with no other power." According to Justice Timlin, Wisconsin supreme court, in an address given before the Wisconsin State Bar on "The Delegation of Legislative Power," "When the commission acts on its own initiative and investigates and decides, fixing either a maximum of reasonableness or the exact amount of the rate which alone will answer the requirement of reasonableness, the commission exercises a power precisely similar to that exercised by the legislative body when the legislative body performs the same function." Vol. 9, REPORTS OF WISCONSIN STATE BAR ASSOCIATION, p. 215. The legislature fixed the rates of common carriers in the early days and thought it was performing a legislative act. But obviously modern rate schedules cannot be successfully fixed in legislative halls. Practical necessity, therefore, demands a different procedure, and the delegation is justified by calling it a different name. Again, one finds cases of mutually reciprocal legislation between states. In the leading case of *People* v. *Philadelphia Fire Assn.*, 92 N. Y. 311, the court upheld a law which provided that insurance corporations of foreign states should pay the same taxes and fines as those imposed in the state of origin by "existing or future laws" upon foreign corporations of like kind. The objection was offered that this law gave power to the foreign legislature to change the domestic tax rate by its future enactments. The court answered that it did not do so, but rather made the domestic rate contingent upon an extrinsic fact, namely, the attitude of the foreign state in like matters. Legislation contingent upon future events is, of course, valid. Interstate amenity in these days of free and extensive intercourse is highly desirable and might even be called a practical necessity. Again, one finds decisions holding valid state-wide laws which are to take effect only in case of a favorable popular vote, and again the courts rely upon the contingency theory, saying that a favorable popular vote is a proper contingency. *Smith* v. *City of Janesville*, 26 Wis. 291. It has, however, been denied that such a proceeding is free from the objection of unconstitutional delegation of power. *In re Opinion of Justices*, 160 Mass. 586.

There are many apparent instances of the delegation of power by Congress to the state legislatures, but in these cases, too, the courts decline to call them delegations of *legislative* power, but, instead, either they discover some other name or reasoning by which to avoid the issue or they totally ignore it. The differences between the powers of Congress and of the legis-

latures of the states under the controlling constitutions probably do not affect the application of the principle of law raised by implication that forbids the delegation of legislative powers. A type of legislation which has caused considerable difficulty is that similar to the act of Congress of 1789, which, in spite of the fact that the Constitution gave Congress the power to regulate commerce and hence navigation, provided that "all pilots shall continue to be regulated in conformity with the existing laws of the state wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose." In the leading case of *Cooley* v. *Board of Wardens,* 12 How. (U. S.) 299, the court held that the future enactments of the states could not be given the force of federal laws because this would amount to an unconstitutional delegation of legislative power, but they could derive force from the inherent power of the states; yet the "then existing state laws" were given the force of an act of Congress by adoption *"so long as they should continue unrepealed by the state which enacted them."* Thus the states were given power to repeal an act of Congress. Clearly this is a delegation of legislative power in its strictest sense. However, the court recognized the necessity for diverse legislation to meet local conditions in the several states. Again, the Wilson Act of 1890 provided that all intoxicating liquors transported into any state should, upon arrival in such state, "be subject to the operation and effect of the laws of such state." This act was held free from the objection of delegation of legislative power over goods in interstate commerce by the circuitous argument that, instead of delegating such power, it simply provided that certain designated articles of interstate commerce should be governed by a rule which divested them of their interstate character at an earlier period of time than would otherwise have been the case. *In re Rahrer,* 140 U. S. 545. In the language of the court, "Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no new power to the states not then possessed, but allowed imported property to fall at once upon the arrival within the local jurisdiction." The court was certainly influenced to some degree, just as Congress had been, by the inability of "dry" states to enforce prohibition laws so long as the "original package" doctrine permitted practically unrestricted importation. This inability supplied the element of "practical necessity" under the influence of which the courts usually find some way to avoid conflict with the doctrine forbidding delegation of legislative power. Again, Section 9150, U. S. COMPILED STATUTES, 1913, provides: "The quarantines and other restraints established by the health laws of any state, respecting any vessels arriving in or bound to any port or district thereof, shall be duly observed by the officers of the customs revenue of the United States * * * *and all such officers of the United States shall faithfully aid in the execution of such quarantines and health laws."* The courts apparently have never even questioned this act as an unconstitutional delegation of power. The analogy is extremely

close between this and the proposed legislation in the principal case, which in effect would result in state officers being ordered to "faithfully aid in the execution of" federal prohibition laws.

It must be clear that a rigid adherence to the doctrine forbidding delegation is far from satisfactory. It hampers legislatures in the conduct of governmental affairs. It forces courts to doubtful expedients to justify legislative acts. The prime purpose of the doctrine is to promote the general welfare by compelling the legislators who are responsible to the people to determine state policies, but a strict adherence to it will cause it to defeat its very end. It is a doctrine which is implied from the clause of the Constitution which vests the legislative power in a legislature, but in applying the provisions of a constitution the guiding star should be, so far as possible, to effectuate its primary purpose, namely, the welfare of the people.

With this in mind, it is not unreasonable to attach considerable significance to the observations occasionally made by the courts with reference to the necessity of delegating some fraction of the legislative power under special circumstances. The Wisconsin court in *Minneapolis, St. Paul & Sault Ste. Marie R. R.* v. *Wisconsin R. Com.*, 136 Wis. 146, in commenting upon the argument that a delegation of rate-making power to commissions was contrary to the organic law, said: "Such a construction would make the mere implications of the Constitution greater than the Constitution itself, and would lose sight of the main and paramount purpose of the creation of the state and the adoption of the constitution. A constitution so construed would last only so long as it took to bring about an amendment or a new constitution. * * * This is called by counsel the doctrine of expediency, but we think it the doctrine of common sense that forbids implications from an instrument which tend to render nugatory or destroy that instrument." Again, in *Butterfield* v. *Stranahan*, 192 U. S. 470, the constitutionality of an act which prohibited the importation of inferior teas and gave the Secretary of the Treasury power to fix the standards of quality of tea to be imported was questioned. The court said: "Congress legislated on the subject so far as was reasonably practicable, and from the necessities of the case was forced to leave to executive officers the duty to bring about the result pointed out by the statute. To deny power to Congress to delegate such a duty would in effect amount to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously executed." These and other similar utterances suggest the embryonic development of some theory by which the doctrine forbidding delegation might be qualified, and the authority to delegate legislative power conceded to an extent to be measured by the necessities of the particular case in order that statutory regulation may be made effective.

In summary, and before concluding, the following outstanding considerations of the issue involved must be borne clearly in mind:

1. The doctrine forbidding re-delegation is implied only, and implications should not be regarded as sacred when they defeat their very purpose.

2. The necessities of modern legislation make occasional delegation of fractional portions of the legislative power imperative.

3. The courts do, in fact, recognize such delegations when they appear sufficiently necessary, but are reluctant to call them by their true name.

4. Some courts have at least suggested that a modification of the original doctrine is essential so that in proper cases sensible results may be reached in a logical manner.

It would be presumptuous to attempt to enunciate any new theory of constitutional law on the basis of the foregoing extremely sketchy review of the authorities, but it is neither presumptuous nor academic to quote the words with which Justice Timlin concluded his address, above cited. He said: "I should say in conclusion that whether or not a statute is invalid because of an unconstitutional delegation of legislative power depends upon the extent to which the power usually exercised by the legislature is attempted to be delegated; that delegation to a greater extent is permissible where without such delegation it is impossible to make the statute effectual for an exercise of legislative power otherwise clearly constitutional; that the validity of such a statute does not depend upon the conventional or legal name of that fraction of legislative power delegated, nor upon its intrinsic nature, but *rather upon the necessity for such delegation* and the existence of a general rule of statute law covering the subject in general terms, to which rule the delegated power is an aid or adjunct."

If this principle had been applied to the proposed Massachusetts legislation in the principal case, it can hardly be doubted that an opposite result would have been reached. It is true that the attempted delegation is of an unusual sort and should be carefully scrutinized for that reason. But when one considers that in the Eighteenth Amendment the state and federal systems are given "concurrent power" for its enforcement, that the federal laws will be in force in Massachusetts in any event, whether they are adopted as state laws or not, that in view of the peculiar difficulties of prohibition enforcement it is particularly desirable that laws promoting that end should be uniform in application, it would seem to be highly desirable, if not a practical necessity, that the sheriff and the marshal act under like laws. This result could be accomplished by successive enactments by the General Court, but all considerations of convenience seem to justify an automatic injection of the federal laws into the state system. It should be noted that the opinion is written on proposed and not enacted legislation. It is not improbable that, had the legislature actually passed the measure before the question of its constitutionality arose, the court would have found a way to avoid holding it unconstitutional. E. B. S.

DUE PROCESS—EQUAL PROTECTION—DENIAL OF THE INJUNCTIVE REMEDY. —During the past two decades the power of a court of equity to issue an injunction in labor disputes has been inveighed against in the bitterest terms. In two recent cases the Supreme Court of the United States has been confronted with the problems raised by the injunction, and in both instances